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JUN 6 1958
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No. 1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY, *et al., Respondents*

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR CERTIORARI FOR THE CITY OF HATTIESBURG, MISSISSIPPI

C. W. SULLIVAN
City Attorney
Hattiesburg, Mississippi

BRYCE REA, JR.
1329 E Street, N. W.
Washington 4, D. C.

Counsel For City of Hattiesburg, Mississippi

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REASONS FOR FILING THIS BRIEF

This Memorandum Brief is filed in support of Petitioner here, Willmut Gas & Oil Company, pursuant to Rule 42(4) of the Rules of this Court. Petitioner is a public utility authorized to distribute natural gas in Hattiesburg, Mississippi. Any recovery by it from Respondent United Gas Pipe Line Company will inure in large part to the benefit of the residents of Hattiesburg. Hattiesburg therefore files this brief as *parens patriae* for and on behalf of its inhabitants.

THE BASIC QUESTION IN THE CASE

A natural gas company is, pursuant to the Natural Gas Act, certificated by the Federal Power Commission to make sales of gas to Petitioner in interstate commerce at a rate filed with the Commission. It abandons those sales in violation of the Natural Gas Act and substitutes therefor sales in intrastate commerce at the same rate. Thereafter the Federal Power Commission on the complaint of Petitioner, orders sales in interstate commerce resumed, finds the rate filed with it as governing interstate sales to Petitioner to be unjust, unreasonable, discriminatory and unlawful and orders it reduced. Do the Natural Gas Act and the principles of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U.S. 246, deprive a state court of jurisdiction to award Petitioner reparations under the law of the state for excessive charges paid for the gas sold in intrastate commerce during the time when sales in interstate commerce had been abandoned?

STATEMENT OF THE CASE

From 1943 until February 6, 1947 United, pursuant to certificates issued by the Federal Power Commission under Section 7(e) of the Natural Gas Act, sold and delivered to Willmut at Hattiesburg, Mississippi gas produced in Texas and Louisiana. United charged Willmut a rate of 25¢ per mcf, which rate was filed with the Federal Power Commission pursuant to Section 4(e) of the Natural Gas Act. In 1947, when United commenced to take gas from the Gwinville Field in Mississippi it physically re-arranged its pipeline system so as to discontinue the flow of interstate gas from Texas and Louisiana to Willmut and replace

it with a flow of intrastate gas from the Gwinville, Mississippi field.

On December 8, 1948 Willmut, jointly with the City of Hattiesburg, Mississippi, filed a complaint with the Federal Power Commission under Section 5(a) of the Natural Gas Act alleging that the rate of 25¢ per mcf filed with the Commission for sales to Willmut was unjust, unreasonable, unduly discriminatory and preferential, and therefore unlawful. United challenged the jurisdiction of the Commission to entertain the complaint on the ground that the gas delivered to Willmut was produced, transported, delivered and consumed wholly within the State of Mississippi.

The Federal Power Commission held hearings on the complaint and at the conclusion thereof, on June 1, 1953, issued Opinion and Order No. 252. That Opinion and Order found that United's re-arrangement of its system constituted both a physical abandonment of facilities subject to the jurisdiction of the Commission and an abandonment of service in interstate commerce rendered by means of such facilities without the permission and approval of the Commission, all in violation of Section 7(b) of the Natural Gas Act. It held that this illegal abandonment of facilities and service and the substitution of intrastate service therefor did not deprive the Commission of jurisdiction to entertain the complaint. It therefore ordered United "to restore and re-establish the facilities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

By the same Opinion and Order No. 252 the Federal Power Commission found that "by its failure without lawful justification to make natural gas available to

Willmut at the same rates or charges voluntarily established [for another customer], United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to [that other customer] and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the [Natural Gas] Act." It therefore ordered United to reduce its rate to Willmut from 25¢ per mcf to 17.5¢ per mcf.

Thereafter Willmut filed a bill in equity in the Chancery Court of Forrest County, Mississippi for the recovery of excessive, discriminatory and unlawful rates charged by United for intrastate gas delivered to Willmut from February 6, 1947 to June 20, 1953, the date on which United complied with Opinion and Order No. 252 of the Federal Power Commission. United filed a motion to dismiss the bill on the ground that the Federal Power Commission had exclusive authority in the matter. The Chancery Court overruled this motion. On an interlocutory appeal the Supreme Court of Mississippi held:

> "The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component [of gas] lost its intrastate character and there remained no power in the courts to apply the common law of the State.
>
> "The chancery court erred in not sustaining the motion to dismiss the bill for want of jurisdiction to determine the issues presented, and its order is therefore reversed. On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended

pleading could enable Willmut to maintain its suit. It would serve no purpose to remand the case, and final judgment will be rendered here dismissing the bill."

So holding, the Court reversed the order of the Chancery Court of Forrest County and entered final judgment dismissing Willmut's bill.

REASONS WHY THE WRIT SHOULD BE GRANTED

Preliminary Statement

The Natural Gas Act was designed to close the regulatory gap existing as a result of holdings of this Court that there was a lack of constitutional power in the states to regulate wholesale sales of natural gas in interstate commerce. *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672. The Supreme Court of Mississippi in this case holds that the authority of the Federal Power Commission under the Natural Gas Act to regulate sales in *interstate* commerce, specifically its authority to compel sales to be made in that commerce at rates fixed by the Commission, destroys the power of the states to regulate the rates for sales actually made *intra*state commerce. This in effect interprets the Natural Gas Act as closing one regulatory gap only to open another.

The Supreme Court of Mississippi grounds its decision primarily on *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246. It interprets this Court's opinion in that case as holding that the Natural Gas Act destroyed Petitioner's right under the common law of Mississippi to a reasonable rate for sales of gas produced, transported, delivered and consumed wholly in Mississippi. We submit that

this interpretation of the *Montana* Case is erroneous. Moreover, it squarely conflicts with the interpretation of that case by the United States Court of Appeals for the District of Columbia Circuit in *U. S.* v. *Davidson Transfer & Storage Company, Inc.*, No. 14123, decided April 24, 1958.

There can be no doubt that the Supreme Court of Mississippi has decided a federal question of substance in such a way as to seriously upset the balance of governmental power between the states on the one hand and the United States on the other. This Court has no function more important than to assure that this balance is properly struck and maintained. Thus this case clearly calls for the exercise by this Court of its discretion to review on writ of certiorari. Rule 19.

The Montana-Dakota Case

Montana-Dakota Utilities Co. purchased electric power from Northwestern Public Service Co. in interstate commerce at rates filed with the Federal Power Commission pursuant to the Federal Power Act. It invoked the federal question jurisdiction of a United States District Court in a complaint alleging that the Federal Power Act gave it a right to reasonable rates, that the filed rates Northwestern had charged it over a period of years were unreasonably high, that Northwestern had misled the Federal Power Commission into accepting the rates by failing to comply with its obligations of disclosure under the Federal Power Act, that the rates had therefore been improperly established and filed, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Judgment was sought

for the difference between the rates charged and what Montana alleged to be the reasonable rates.

This Court held that since there was no diversity of citizenship the complaint failed to state a cause of action cognizable in a United States District Court. Its rationale was that under the Federal Power Act rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." The "right to a reasonable rate is the right to the rate which the Commisson files or fixes." This Court therefore directed that the complaint be dismissed for failure to state a claim upon which relief could be granted.

The Montana-Dakota Case Is Inapposite Here

The contrast between the situation in the *Montana* Case and the situation in this case is sharp. In the *Montana* Case the plaintiff purchased electric power in *inter*state commerce at rates filed with and accepted by the Federal Power Commission as governing the purchases made. In this case Petitioner purchased gas in *intra*state commerce. It is true that the rates at which it purchased were filed with the Federal Power Commission by United. However, they were not filed as applicable to its *intra*state sales in issue. They were filed as applicable to *inter*state sales of gas produced in Louisiana and Texas, which sales it had abandoned before the period of time involved here. In the *Montana* Case the plaintiff asserted a justiciable legal right under the Federal Power Act to a rate other than that filed with the Federal Power Commission as governing the *inter*state purchases it made. In this case Petitioner asserts a right under the common law of Mississippi to a reasonable rate for the *intra*-

state purchases it made, governing which purchases there was no rate filed with the Federal Power Commission.

The Supreme Court of Mississippi held that the rates for sales of gas to Petitioner in intrastate commerce were subject to the exclusive regulation of the Federal Power Commission because on seven occasions over a course of six years, each of which was of only a few hours duration, there were sales in interstate commerce through the same facilities and because some of those facilities and the interstate service rendered by them had been unlawfully abandoned in violation of the Natural Gas Act.

It may be that the jurisdiction of the Federal Power Commission to regulate the rates for sales of gas in interstate commerce carries with it the ancillary jurisdiction to regulate the rates for sales wholly in intrastate commerce commingled therewith. See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414. But until that jurisdiction is in fact exercised the rates for sales in intrastate commerce are clearly regulable by the state in which that commerce is carried on. In this case the Commission at no time purported to regulate United's rates for its intrastate sales to Petitioner. Indeed, as it pointed out in its Opinion No. 252, Appendix III to Petition for Certiorari, p. 25a, it did not even know that those sales were being made until it heard the evidence on Petitioner's complaint in Docket No. G-1158. The only jurisdiction the Commission exercised over United's *intra*state sales to Petitioner was to find that they were unlawful under the Natural Gas Act and to order them stopped. Thus it ordered United to: "Resume the full operation of the natural

gas transmission pipe-line facilities [previously certificated] for the transportation and sale for resale of natural gas, subject to the jurisdiction of the Commission . . . and in accordance with the provisions of the rate schedules required to be filed pursuant to the provisions of [this order]." Opinion No. 252, Appendix III to Petition for Certiorari, p. 37a.

Had United sought and obtained from the Federal Power Commission permission to abandon its interstate service to Petitioner and then substituted intrastate service therefor, there can be no doubt that the rates for its sales in intrastate commerce would have been regulable by the State of Mississippi. Can the result be different simply because it illegally abandoned interstate service and substituted intrastate service therefor? The answer must be no. To answer yes is to say that United may profit from its own wrongdoing—that by the device of violating the federal law it may gain exemption from the application of state law.

The Conflict Between the Supreme Court of Mississippi and the Court of Appeals for the District of Columbia

The Supreme Court of Mississippi interpreted the *Montana* Case, *supra*, as holding that the Federal Power Act abrogated respecting the interstate sales regulated under it the common law right to reparations from a public utility for the exaction of an unreasonable rate. Assuming this interpretation to be correct, we submit that, as we have discussed *infra*, it has no bearing here because the sales in issue here were made in intrastate commerce.

However, the correctness of the interpretation of the Supreme Court of Mississippi is by no means clear.

Neither the Federal Power Act nor the Natural Gas Act in terms abrogate any common law rights existing at the time of their enactment, and it is axiomatic that repeals by implication are not favored. There is nothing in the facts or opinion in the *Montana* Case that compels the conclusion that this Court held that common law rights were so abrogated.

That was a suit in a United States District Court to vindicate a right that was alleged to have been created by a federal statute, et al. a right under the Federal Power Act to reparations for the exaction of an unreasonable rate for sales of electricity in interstate commerce. This Court in terms held only that *under the Federal Power Act* there was no legal right to any rate other than the rate filed with the Federal Power Commission, that therefore there was no judicially cognizable *federal* question, and that therefore, absent diversity of citizenship, there was no cause of action cognizable in a *federal* court. This Court did not discuss, much less make any holding respecting, the right of the plaintiff to maintain in a *state* court a *common law* action to recover reparations for the exaction of an unreasonable rate.

At least two United States Courts of Appeals have interpreted the *Montana* Case as leaving intact whatever common law rights existed before the enactment of the Federal Power Act, in other words, as merely delimiting and defining the jurisdiction of federal courts under the Federal Power Act. *U. S.* v. *T.I.M.E., Inc.*, 252 F. 2d 178 (C.A. 5th 1958), petition for cert. pending, No. 1027, Oct. Term 1957, *sub nom. T.I.M.E., Inc.* v. *U. S.*; *U. S.* v. *Davidson Transfer & Storage Co.*, C.A.D.C. No. 14123, decided April 24, 1958. Both of those cases were suits in federal district courts against the United States under the Tucker

Act for breach of contract. In both cases the plaintiffs, common carriers by motor, alleged that the United States had refused to pay for transportation in interstate commerce applicable rates filed with the Interstate Commerce Commission. In both the United States defended on the ground that the filed rates were unreasonably high and therefore unlawful under Part II of the Interstate Commerce Act. In both the District Courts, relying on *Montana-Dakota*, held that the declaration in Section 216(d) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 316(d), that unreasonable rates were prohibited and unlawful was merely a criterion for administrative action, and that the United States as a shipper had no justiciable legal right to any rate other than the filed rates. In both cases the Courts of Appeals reversed, holding the rule of *Montana-Dakota* to be inapplicable where, as in both, the shipper sought to enforce a common law right which, because of the Tucker Act, was cognizable in a federal district court. To quote the opinion of the District of Columbia Circuit in the *Davidson* Case, Slip Op., p. 9:

> "The difficulty [in Montana-Dakota] was not lack of a cause of action but lack of a cause cognizable in a federal court . . . In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling."

If the holdings in the *T.I.M.E.* Case and the *Davidson* Case are right—if, despite the enactment of Part II of the Interstate Commerce Act and the interpretation of the substantially identical rate regulatory provisions of the Federal Power Act in the *Montana* Case, there is a judicially cognizable common law

right to a reasonable rate for sales clearly made in *inter*state commerce, *a fortiori* there is a judicially cognizable common law right to a reasonable rate for sales in *intra*state commerce. It is this latter right that Petitioner seeks to vindicate here. It is this right that the Supreme Court of Mississippi denied it.

The Concurrent Regulatory Authority of the United States and the States

The implied but nonetheless basic premise of the Supreme Court of Mississippi is that the mere existence of federal regulatory power over sales of gas for resale by United to Willmut forecloses state regulation. See *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298; *Public Utilities Com.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; *State Corp. Com.* v. *Wichita Gas Co.*, 290 U.S. 561. These cases held that the regulation of the wholesale rates for gas and electricity moving in interstate commerce was beyond the constitutional powers of the states.

We submit that these cases do not reflect sound constitutional doctrine. This Court has so indicated. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684. Indeed it has so held in sustaining state minimum price orders applicable to sales of gas in interstate commerce which were not in conflict with the provisions of the Natural Gas Act as then interpreted or with outstanding orders of the Federal Power Commission issued thereunder. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190. The holdings in the two last cited cases are not undermined by the subsequent holding in *Natural Gas Pipeline Company* v. *Panoma Corp.*, 349 U.S. 44, striking

down similar state minimum price orders. Rather, a comparison of the holdings illustrates the point. Thus, state regulation was allowed where, as here, federal authority was not in fact exercised. State regulation was denied where, as in *Panoma*, federal authority was in fact exercised.

In the *Cities Service* Case, at p. 186, this Court said:

> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. Cooley v. Board of Wardens of Port of Philadelphia, 1851, 12 How. 299, 13 L. Ed. 996. It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. [Citations] The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation."

The quoted statement is sound law and the tests it lays down for the exercise of state authority are met here. Certainly the rates United charges Petitioner, being in large part determination of the rates Petitioner charges ultimate consumers, are of vital local concern. Certainly the grant by Mississippi of the relief Petitioner seeks against United will not have any impact on or in any way discriminate against or

burden interstate commerce. Nor is this a case in which a national interest preventing State action must be weighed against the local interest to be protected. On the contrary, the relief Petitioner seeks furthers the precise national interest that the Natural Gas Act was passed to further, i.e., the protection of ultimate consumers of gas from unreasonable rates. Petitioner seeks to have Mississippi do precisely what the Federal Power Commission would have done had the Congress granted it the necessary authority, i.e., require United to disgorge monies collected under exorbitant rates. Mississippi and the United States both having concurrent constitutional power in the matter at issue and the Congress having chosen not to exercise jurisdiction, Mississippi is free to do so.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and in this Brief, the City of Hattiesburg prays the Court to issue a writ of certiorari to the Supreme Court of Mississippi.

Respectfully submitted,

C. W. Sullivan
City Attorney
Hattiesburg, Mississippi

Bryce Rea, Jr.
1329 E Street, N. W.
Washington 4, D. C.

Counsel For City of Hattiesburg, Mississippi

Dated: June 6, 1958